

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
12/18/2001

*** FILED ***
01/04/2002
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000615
Docket Code 512

FILED: _____

STATE OF ARIZONA

ALISON FERRANTE

v.

CHRIS C KLEINSTEUBER

JUSTIN BERESKY

GILBERT CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

GILBERT CITY COURT
Cit. No. #01CR191MI

Charge: 1. ASSAULT
2. CRIMINAL DAMAGE A CL2 MISDEMEANOR DOMESTIC VIOLENCE

DOB: 12/11/64
DOC: 12/23/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment on December 5, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Gilbert City Court, and the Memoranda submitted by counsel.

The only issues raised by Appellant on appeal concern the revocation of his probation. Appellant was previously convicted of Assault, a class 1 misdemeanor in violation of A.R.S. Section 13-1203(A)(1), and Criminal Damage, a class 2 misdemeanor in violation of A.R.S. Section 13-1602. As punishment for these offenses Appellant was placed on probation for a period of 36 months and ordered to serve 180 days in the Maricopa

County Jail, but this sentence was suspended pending completion of probation. Within a month of being placed on probation, a Petition to Revoke Appellant's Probation was filed July 12, 2001 with the Gilbert City Court. This Petition to Revoke Probation alleged violation of condition #1 and condition #9 of probation. The violation of condition #9 is the relevant one, because that is the term of probation which the trial court found that the Appellant had violated. Condition #9 alleged that Appellant had violated his probation by "failure to not go on or near the residence of the victim, Rene Kleinsteuber, located at 525 W. Candlewood, Gilbert, Arizona, as alleged in Gilbert Police Departmental Report #01-6484."

First, the Appellant claims that he was denied the right of due process in the failure of the Petition to Revoke to specifically allege, with regard to condition #9, the date the alleged violation had occurred. There is no question but that the right of due process specifically applies to probation revocation hearings.¹ Appellant points out that the allegation regarding a violation of condition #1 of probation refers to a specific date: July 4, 2001. Appellant contends that he believed that date also applied to the violation of condition #9. However, Appellant's position is not supported by the record as the Petition clearly does not include a date for the alleged violation of condition #9 of probation.

This Court also notes that any technical defect in the Petition to Revoke Probation in the failure to list a specific date regarding the condition #9 violation could be cured by amending the Petition to Revoke Probation. Rule 13.5(b), Arizona Rules of Criminal Procedure, permits amendment of an Information or Indictment to conform to the evidence "in any court proceeding". The rule also provides that defects in a charging document "and a Petition to Revoke Probation is a charging document" shall only be raised by pretrial motion.² The alleged defect in the Petition to Revoke Probation was not raised as a pretrial issue. It was probably not raised for the reason that Appellant explains: Appellant assumed that the date of the violation of condition #9 was the same as the violation of condition #1. Nevertheless, at the beginning of probation revocation proceeding the trial court clarified the date that the State was alleging Appellant had violated condition #9:

... the allegation, if I'm mistaken, based on Mr. Owens' argument, is that on the 18th right after she — after he was sentenced by this court, Judge Lauren, and ordered not to return to that residence, to the residence where Rene lived, and that's what the State is alleging he did. He went back to the same residence. And he went back numerous other times during that — during June.³

Additionally, this Court notes Appellant failed to object to the amendment or clarification of the Petition to Revoke Probation. Appellant contends on appeal that he was unprepared to defend against the allegation that he committed a violation on June 18, 2001; however, Appellant's counsel never indicated anything of that sort to the trial judge.

¹ *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982).

² Rule 13.5(c), Arizona Rules of Criminal Procedure.

³ R.T. of August 2, 2001 at page 43.

Appellant also contends that insufficient evidence was presented that Rene Kleinsteuber resided at 525 W. Candlewood, Gilbert, Arizona as her residence at the time of the alleged violation. Additionally, Appellant claims that he did not knowingly violate the conditions of his probation. These factual issues concern the sufficiency of the evidence to warrant the finding that Appellant had violated term and condition #9 of his probation. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.⁴ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.⁵ If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.⁶ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁷ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁸ The Arizona Supreme Court has explained in *State v. Tison*⁹ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹⁰

This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

For all of the reasons discussed above,

IT IS ORDERED affirming the trial court's finding that Appellant had violated the terms and conditions of probation and the sentence imposed.

⁴ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

⁵ *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

⁶ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

⁷ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3d 977, review granted in part, opinion vacated in part 9 P.3d 1062; *Ryder v. Leach*, 3 Ariz. 129, 77P. 490 (1889).

⁸ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

⁹ SUPRA.

¹⁰ Id. At 553, 633 P.2d at 362.

IT IS FURTHER ORDERED remanding this matter back to the Gilbert City Court for further and future proceedings.